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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Pesticide Control Board
Virginia Administrative Code (VAC) citation	2 VAC 20 - 51
Regulation title	Regulations Governing Pesticide Applicator Certification Under Authority of the Virginia Pesticide Control Act
Action title	Certifying pesticide applicators and making changes as directed by the Pesticide Control Board to curtail abuse of proctoring privileges.
Document preparation date	Enter date this form is uploaded on the Town Hall

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The purpose of the proposed action is to review the regulation for effectiveness and continued need.

This regulation requires any person who uses or supervises the use of (1) restricted use pesticides as a private applicator, (2) general or restricted use pesticides as a commercial applicator or registered technician or (3) general or restricted use pesticides as a commercial applicator not-for-hire to participate in approved training, pass an approved written examination and be certified as a pesticide applicator by the Virginia Department of Agriculture and Consumer Services. Also, categories for certification, training requirements and procedures for renewing certification are described. This regulation also establishes record-keeping requirements for pesticide applicators, and requirements for reporting pesticide accidents, incidents, or loss.

These regulations were extensively revised and adopted by the Board in March, 1999. At the time the Board addressed many of the suggestions and concerns expressed by the public who were afforded many opportunities to comment on the proposed regulations in accordance with the Administrative Process Act and the Board's Public Participation Guidelines. However, the Board recommends that additional amendments to the regulations are necessary to help reduce fraudulent examination activities by eliminating proctoring by private individuals, more clearly define application and training requirements, to establish applicator categories in areas where needed for industry, and to meet EPA requirements and for housekeeping purposes.

Legal basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

This regulation is authorized by § 3.1-249.30 of the Code of Virginia (1989), as amended. The Pesticide Control Board's (PCB) authority for this regulation is discretionary. However, provisions of the Federal Insecticide, Fungicide, Rodenticide, and Insecticide Act (FIFRA) require all applicators who apply Restricted Use Pesticides (RUP) to be certified.

The basis for this regulation is § 3.1-249.30.4, § 3.1-249.30.5, § 3.1-249.30.8, § 3.1-249.51 B, § 3.1-249.52 A, § 3.1-249.53 A, § 3.1-249.54 A, and § 3.1-249.55 of the Code of Virginia. Specifically, § 3.1-249.51 B authorizes the PCB to specify by regulation the amount of training, which may include a period of service, required to qualify a person for each classification or sub-classification of certification as a commercial applicator or registered technician. § 3.1-249.52 A prohibits anyone, except growers of agricultural commodities trading personal services, from applying pesticides of any kind for compensation of any kind, without first obtaining certification as either a commercial applicator or registered technician in accordance with regulations promulgated by the PCB. In addition, § 3.1-249.53 A requires all state agencies, municipal corporations or other governmental agencies to be subject to the provisions of the Virginia Pesticide Control Act (Act) and regulations adopted under the Act. § 3.1-249.54 A requires growers of agricultural commodities to be certified according to regulations promulgated by the PCB in order to apply RUPs. 2 VAC 20-51-50 B of the regulation authorizes the Commissioner to approve commercial applicators to proctor Registered Technician examinations. The web address for the Virginia Pesticide Control Act is: <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+3.1-249.27>.

The regulation does not exceed the state mandate but does exceed the federal requirements in that certification under the FIFRA, is only required for those who apply RUPs. Also, FIFRA requires recertification once every five years whereas Virginia Code requires recertification once every two years. Because of the tragic deaths of two Virginia citizens in 1987, as a result of the misuse of a general use pesticide, the General Assembly enacted the Act, with provisions which exceeds the minimum standards established by the federal government, in order to protect the health and safety of Virginia citizens and to protect Virginia's environment.

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed. Include the specific reasons why the regulation is essential to protect the health, safety, or welfare of citizens. Delineate any potential issues that may need to be addressed as the regulation is developed.

Some of the changes or amendments being contemplated are:

Amend 2 VAC 20-51-10 “ *Under the direct on-site supervision of*” to include language that would make it clear that the supervising commercial applicator conducting the training must be within sight of the training applications and not just anywhere on the property being treated.

Amend 2 VAC 20-51-20 B 1 to include “day-care facilities” as one of the areas where commercial applicators not-for-hire must be certified in order to use any pesticide. § 3.1-249.53 E of the Code of Virginia requires that commercial applicators not-for-hire who apply pesticides in day-care facilities be certified. This requirement was inadvertently left out of the current regulation.

Amend 2 VAC 20-51-20 D to include a specific requirement that individuals desiring certification submit an application appropriate for the category or subcategory for which they wish to be certified. This section does not specifically state this requirement, although it is implied. Subsequent sections describe the application information.

Amend 2 VAC 20-51-20 to include a subsection H that states that certified commercial applicators and private applicators may only apply pesticides in category-specific activities in which they have met minimum standards and successfully passed the appropriate examinations for that category or subcategory.

Amend 2 VAC 20-51-50 A 1 to include a specific statement that the 20 hours of required on-the-job-training must be in the application category or subcategory in which the applicator will be working and under the direct, on-site supervision of a commercial applicator certified in the category or subcategory in which the person is being trained. Current language does not make the training specific to the exact area of work and leaves open the possibility that registered technicians could legally apply pesticides in categories or subcategories in which they had received no training.

Amend 2 VAC 20-51-50 A to include language that would require when a certified registered technician wants to apply pesticides in an application category or subcategory that is different from that in which they received their initial on-the-job training, they must first obtain 20 hours of on-the-job training under the direct, on-site supervision of a commercial applicator certified in the category or subcategory in which the registered technician wants to work.

Amend 2 VAC 20-51-50 A to redefine the sequence of requirements for persons wanting certification as a Registered Technician. The PCB wants to insure that the entire process from the hiring of an individual to the applicant actually taking the examination will be completed within 90 days.

Repeal 2 VAC 20-51-50 B. This section allows authorized Commercial Applicators to proctor Registered Technician examinations. This provision was originally added to the regulation to shorten the time it took to get applicants tested and ready to work independently. The initial processing time from application to receiving certificates allowing the applicant to begin work had been 20-22 days. Since the Pesticide Knowledge Automated Testing System has been implemented in all DMV Customer Service Centers statewide, these examinations can now be taken 5½ days per week at 72 locations. Once authorization is received to take the registered technician examination, applicants can now take the examination and leave the DMV Customer Service Center with documents allowing them to begin work immediately. The total processing time once an application is received by VDACS can now be as few as 3 days if the applicant goes to take the examination the next day after receiving the letter of authorization to test. The initial purpose for the proctoring program is not now justified. Over the last several years the agency has observed widespread abuse of the examination procedures by commercial applicator proctors. There is documented evidence that examination questions have been given to applicants prior to taking the exams. Some proctors have actually filled out examinations for applicants who never took the exams.

Amend 2 VAC 20-51-70 A to add a “Miscellaneous” category to provide the Board flexibility to place applicators in an appropriate designation in those instances when U.S. EPA requires states to regulate either a newly designated Restricted Use Pesticide or use of a pesticide. Virginia’s regulatory development process generally does not allow sufficient time to respond to federal changes in certification requirements in a timely manner.

The regulation is necessary to protect health, safety and welfare of citizens because it ensures that those individuals applying pesticides are properly trained so that they may apply pesticides in a manner that will not harm people or the environment. Also, by requiring the training and certification of pesticide applicators, citizens are able to save considerable money in that necessary pesticide applications are made using only the amounts required to control targeted pests.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action.

The only known alternative would be for Virginia to not have its own pesticide applicator certification regulation, which would allow for enforcement of the federal law and regulations by U.S. Environmental Protection Agency personnel. This alternative was rejected because most Virginia growers and pesticide-related businesses would prefer to be regulated by State personnel rather than by federal personnel with no particular stake in Virginia interests. By having the State regulation, pesticide-related regulation activities are conducted in a manner that is both environmental sound and in concert with Virginia needs. The Virginia regulation also allows State personnel to enforce pesticide-related federal laws and regulations in Virginia.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability.

It is not expected that any of the contemplated actions listed above will negatively impact the institution of the family and family stability, including rights of parents in the education, nurturing, and supervision of their children. These actions will not negatively impact economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents. The actions also will not erode marital commitment or decrease disposable family income.

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